

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF TEXAS  
3 WACO DIVISION

4 TEXTRON INNOVATIONS, INC.) Docket No. WA 21-CA-740 ADA  
5 )  
6 vs. ) Waco, Texas  
7 )  
8 SZ DJI TECHNOLOGY CO., )  
9 LTD. ) December 6, 2022

10 TRANSCRIPT OF DISCOVERY HEARING VIA VIDEOCONFERENCE  
11 BEFORE THE HONORABLE DEREK T. GILLILAND  
12

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1 (Proceedings Continued:)

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25 Proceedings reported by digital sound recording,  
transcript produced by computer-aided transcription.

1 (Proceedings commence at 9:29 a.m.)

2 THE COURT: All right. Good morning, everybody.

3 We're here for a discovery dispute, and we're

4 going to start by having Ms. Copp call the case.

5 THE CLERK: Yes, your Honor.

6 Calling Case No. WA-21-CV-740, styled, Textron  
7 Innovations, Incorporated vs. SZ DJI Technology Company,  
8 Limited, et al. Called for a discovery hearing.

9 THE COURT: All right. Could I get announcements  
10 starting with the plaintiff.

11 MR. SIEGMUND: Good morning, your Honor.

12 This is Mark Siegmund on behalf of Plaintiff  
13 Textron Innovations, Incorporated. With me this morning  
14 is Harrison Rich and Mark Speegle with Baker Botts, and  
15 Kevin Meek with McDermott. Also in attendance is Rus  
16 Holloway, deputy general counsel with Bell Textron. And  
17 Mr. Rich will be the main speaker this morning, your  
18 Honor.

19 THE COURT: All right. Very good. Well, good to  
20 see you, Mr. Siegmund, and team. And especially thanks,  
21 Mr. Holloway, for joining us. I always appreciate it when  
22 client representatives attend.

23 Announcements for defendant, please.

24 MR. PALMER: Good morning, Judge.

25 This is John Palmer with Naman Howell. I am --

1 probably this is as much you're going to hear from me.  
2 But Ben Schlesinger at Finnegan will be speaking primarily  
3 and we represent the defendant.

4 THE COURT: Okay. Very good. Good to see you,  
5 Mr. Palmer, Mr. Schlesinger. I think I've organized my  
6 windows to where the two main speakers are reasonably  
7 close to the camera, so it looks like I'm looking at you  
8 to the extent it does.

9 All right. So with this, I've read through the  
10 parties' briefing on it. I've kind of got an idea of what  
11 I want to do but let me -- I'll give both parties an  
12 opportunity to address the issue. And I'm curious, when  
13 are expert reports due in the case? I assume those have  
14 not been done yet, but I haven't pulled the schedule to  
15 see.

16 MR. RICH: Your Honor, good morning. Harrison  
17 Rich for the Plaintiff Textron.

18 Expert reports are due in about 48 hours. So we  
19 are right at the expert report deadline.

20 THE COURT: Got it. Got it. Okay. And if you  
21 want, Mr. Rich, go ahead and walk me through the  
22 chronology and what -- I guess, Textron wants any  
23 non-infrin -- any non-infringing alternative struck or is  
24 there some subcategory?

25 MR. RICH: Your Honor, we are asking the Court to

1 preclude DJI from relying on any NIAs or evidence or  
2 supporting facts beyond what is literally listed in their  
3 supplemental interrogatory response to Interrogatory No.  
4 7.

5 THE COURT: And that supplemental response was  
6 provided, is that the one that was done on the 17th?

7 MR. RICH: Correct, your Honor. It was one hour  
8 into the deposition of their corporate representative on  
9 NIAs.

10 THE COURT: Go ahead.

11 MR. RICH: Your Honor, I was just going to say,  
12 I'm happy to walk you through the chronology if the Court  
13 would find that helpful.

14 THE COURT: Yeah. Go ahead, just quickly.

15 MR. RICH: Okay. Thank you, your Honor. May I  
16 share my screen with the Court?

17 THE COURT: Certainly.

18 MR. RICH: All right. Your Honor, can you see  
19 the screen?

20 THE COURT: I can. Thank you.

21 MR. RICH: All right. So, your Honor, as you  
22 know, this dispute presents a straightforward question  
23 about whether DJI should get to rely on evidence or  
24 testimony on non-infringing alternatives that it failed to  
25 disclose in its interrogatory response, despite having

1 previously agreed to supplement that interrogatory. And  
2 we submit that the answer to that question should be no  
3 because DJI should have told us about the NIAs back in  
4 August. And because we didn't get to investigate or test  
5 the NIAs against any witnesses, DJI should be held to what  
6 is literally in their interrogatory response. And DJI's  
7 expert should not be allowed to backfill facts about NIAs  
8 or provide new NIAs.

9 And we provided your Honor with a timeline in our  
10 dispute chart that really highlights the problem with what  
11 DJI did here. And I'm just going to touch on a few of the  
12 highlights from that timeline.

13 The dispute originates back in June of 2022 when  
14 we served our Interrogatory No. 7, asking for DJI's NIAs  
15 and supporting facts. And the reason we served that first  
16 rog early on, your Honor, is an important one. We wanted  
17 to know what those NIAs were so we could adequately  
18 prepare our case, including through conducting necessary  
19 discovery about those NIAs and facts, whether that be  
20 through DJI's witnesses or third parties. And DJI punted  
21 on its interrogatory response to expert discovery without  
22 providing any substantive response.

23 So on August 12th of 2022, we've met and  
24 conferred with DJI and DJI agreed to provide a  
25 supplemental response to our interrogatory. That, too, is

1 important because the major premise of DJI's argument is  
2 that the parties agreed to defer responding to that  
3 interrogatory until expert discovery. And that's false.  
4 Exhibit 1 to our dispute chart proves that point. And I  
5 am putting Exhibit 1 here on this slide. This is our  
6 summary in all of the meet-and-confer and you can see from  
7 the highlighted language, our summary reflects the  
8 parties' agreement that DJI would supplement its response  
9 if it developed a contention that there were NIAs to any  
10 asserted patent, and that's in August of 2022.

11 And if there were any doubt about that agreement,  
12 I'm showing DJI's response to our e-mail here on this  
13 slide, and there's a lot of text here and not a lot of  
14 highlighting and there's a reason there's no highlighting,  
15 and that's because they didn't dispute our agreement.

16 So now, moving to the 30(b)(6) process, we saw  
17 that DJI flip-flopped four times on whether it would  
18 designate a witness; and one of those four times occurred  
19 on November 9th, when DJI revoked the designation of DJI  
20 witness, Mr. Shang. Not surprisingly, I went ahead and  
21 asked Mr. Shang about NIAs, and he didn't have any  
22 knowledge. He wasn't familiar with the patent or anything  
23 about infringement.

24 So we then asked DJI's next technical 30(b)(6)  
25 witness, Mr. Zhang, on November 14th about NIAs. And when

1 we asked Mr. Zhang about NIAs, he said that he had  
2 knowledge. So we asked the natural followup, well, what's  
3 that knowledge? And DJI's counsel asked for a break to  
4 talk with the witness to explore privilege issues. But  
5 when we came back from that break, DJI's counsel shut down  
6 the deposition, not on the basis of privilege but on the  
7 basis that we were a couple minutes over our allotted  
8 time. And that's what the question pending and that's a  
9 bit shocking from our perspective because the break was  
10 supposed to be to discuss privilege and no privilege was  
11 asserted. And DJI makes a big deal about how we were a  
12 few minutes over our time, but I don't think that's quite  
13 right.

14 We had a 30(b)(1) notice out and this was also a  
15 30(b)(6) witness, so we had more than 10 hours. And  
16 because DJI chose the location in China where nobody could  
17 get to, we had to take these depositions remotely with two  
18 translators overnight. So I think it's entirely unfair to  
19 cut off the deposition in the way they did.

20 Now, when we move on to the last 30(b)(6)  
21 designee, Mr. Ai, on November 16th and 17th, we got his  
22 designation the day before his November 17th deposition.  
23 So for context, as of the start of this deposition, DJI  
24 had never before supplemented its response to the NIA  
25 interrogatory or otherwise told us that one was coming.



1           So I started my questioning of Mr. Ai on November  
2 17th and was pretty shocked when I saw an e-mail after the  
3 deposition started that supplemented their interrogatory  
4 response with 29 different NIAs. But that rog response  
5 didn't provide anything beyond a generic listing of the  
6 NIAs. There were no supporting facts.

7           As you can imagine, it's highly prejudicial to  
8 try to depose somebody on NIAs when you receive the  
9 disclosure for the first time during the deposition  
10 itself. But I went ahead and asked Mr. Ai about NIAs,  
11 anyways, and Mr. Ai testified that he didn't have any  
12 knowledge about NIAs. And I went ahead and put their  
13 supplemental response in front of them, and as you see at  
14 the bottom of this slide, he said he'd never seen it  
15 before. And I went into detail on those supplemental  
16 responses and I asked him if he had any knowledge about  
17 any of them, and he said he didn't have any knowledge.

18           So with DJI's corporate testimony on November  
19 17th being that it had no knowledge of NIAs, I was ready  
20 to conclude the deposition. Despite DJI's dispute chart  
21 saying that we had used our five hours, I had about 10  
22 minutes left. And I told DJI's counsel that I'm ready to  
23 wrap up during a break and DJI's counsel wanted to break  
24 for the night.

25           DJI did not tell me that they were going to have

1 some closed-doors talks between Mr. Ai and Mr. Shang and  
2 Zhang. But the next day, on November 18th, I received an  
3 e-mail from DJI's counsel telling me to re-ask the  
4 questions about NIAs. But given that we had already  
5 received their corporate testimony on this issue, we  
6 declined to cover the same ground we already covered. We  
7 wrapped up the deposition of Mr. Ai, our questioning, and  
8 DJI's counsel then conducted a lengthy re-direct on NIAs  
9 to draw out facts that weren't in the interrogatory  
10 response.

11 So this re-direct was the first time we'd ever  
12 heard them. And the basis of Mr. Ai's changed testimony  
13 came from Mr. Shang and Zhang. Those were the guys that  
14 told us they either didn't have knowledge or we were  
15 prevented from questioning them when DJI shut down the  
16 deposition. So it's pretty unfair to backfill Mr. Ai's  
17 lack of knowledge with these guys. That's just not how  
18 the 30(b)(6) process should work.

19 Ultimately, your Honor, this entire course of  
20 conduct has been very prejudicial to us. We tried early  
21 on to get the information and were blind-sided with late  
22 disclosures from DJI and a redirect on the very last day  
23 of discovery. We've had no chance to conduct necessary  
24 discovery into NIAs. And we have our expert reports, as I  
25 mentioned, due in 48 hours, so there's no time for further

1 discovery.

2 DJI has repeatedly said that it wants to fight on  
3 the merits, but, frankly, your Honor, we've seen a pattern  
4 of behavior from DJI ranging from the source code dispute  
5 we had before your Honor now to this where we're fighting  
6 with our hands tied behind our back and a blindfold on.  
7 The playing field just needs to be level, and we request  
8 that your Honor preclude DJI from relying on any evidence  
9 or testimony beyond what is literally listed in its  
10 interrogatory response. Thank you, your Honor.

11 THE COURT: Okay. Thank you, Mr. Rich.

12 Is it Mr. Schlesinger? Would you like to  
13 respond?

14 MR. SCHLESINGER: Yes, your Honor. Mr. Rich,  
15 would you mind not sharing your screen?

16 MR. RICH: Yes. I'm trying to find the button  
17 that takes that down. I apologize. Here we go.

18 MR. SCHLESINGER: Okay. Thank you.

19 Yes, your Honor. I mean, first off, what Textron  
20 is trying to do is exclude sworn testimony that answers  
21 questions that it asked on non-infringing alternatives  
22 that a sworn corporate designee provided. I want to start  
23 first with the alleged agreement we had about  
24 non-infringing alternatives.

25 What we agreed and what we discussed is that

1 contention responses were going to be deferred until  
2 expert reports. And if I could show your Honor my screen  
3 as an example. May I share my screen, your Honor?

4 THE COURT: Certainly. Yeah.

5 MR. SCHLESINGER: This is an example of just one  
6 of the Textron's interrogatories. In Exhibit A, we asked  
7 about what products they have that they allege cover the  
8 patents that they provide, and what they provided is,  
9 we'll defer answering this interrogatory until the  
10 forthcoming expert reports. That's what the parties  
11 discussed. What we discussed potentially amending for was  
12 if there is specific facts that come to light. Not expert  
13 testimony, not contentions.

14 But Textron continued to push us to provide all  
15 of these details. And the agreement also is only when  
16 those contentions were -- if they were created. And so,  
17 we did provide that. We provided that in an interrogatory  
18 response. Yes, it was on the last day of discovery just  
19 like Textron provided many interrogatory responses on the  
20 last day of discovery, as well.

21 And we did provide a witness. Mr. Zhang and Mr.  
22 Shang were not the corporate designees for non-infringing  
23 alternates. Mr. Ai was and we provided his -- we put him  
24 up and he answered the questions he could the first night.  
25 He couldn't provide all the answers, so he went and

1 discussed it with colleagues so that he could provide the  
2 information Mr. Rich asked. Now, that was provided a mere  
3 day later and during the deposition -- we agreed to break  
4 these depositions into two five-hour depositions. As for  
5 Mr. Rich saying that he gets more than 10 hours with a  
6 witness, I don't know where that comes from because we  
7 always had an agreement that they would get 10 hours,  
8 which is more than what they're actually provided under  
9 the rules.

10           And again, we were being transparent. We wanted  
11 to provide them a notice that he did learn this additional  
12 information. That's why we sent the e-mail so that they  
13 knew that and knew that walking into the deposition. And  
14 so, when he -- Mr. Rich began the deposition, he  
15 specifically asked about that meeting, asked what he  
16 talked about, and that's the information they're now  
17 seeking to exclude and they appear to be even going  
18 further. But the parties never had an agreement that  
19 expert testimony would be provided during fact discovery  
20 but just facts, and that there's simply no prejudice here.  
21 They've had plenty of time to ask the witness about the  
22 questions. What they're really complaining about is that  
23 they had to potentially re-ask an hour of questions when  
24 they had over three-and-a-half hours left on the record.

25           There's just simply no prejudice. If they're

1 worried about the expert report that's due in 48 hours,  
2 there's time to push that back that rebuttal expert  
3 reports are not due till January 11th. So if they need  
4 more time, we'd be willing to accommodate that. Simply,  
5 Textron doesn't like what it heard, but we should address  
6 this case on the merits, not on discovery fights, your  
7 Honor. Thank you.

8 THE COURT: Okay. Here's what I'm going to do  
9 since we're getting into, yeah, essentially the striking  
10 of what's going to be the realm of experts. I'm not  
11 inclined to address that as a discovery dispute per se.  
12 It's not necessarily directing production or ruling on  
13 withholding of documents. There's definitely some serious  
14 questions about the timing and disclosure of the  
15 information. But to make a ruling on that I think is more  
16 appropriately done with full briefing in the form of a  
17 motion to strike or a Daubert motion rather than as a  
18 discovery dispute.

19 So I've jotted down some pretty good notes. For  
20 future reference for myself and at this time, what I'm  
21 going to do, Mr. Rich, is deny Textron's request without  
22 prejudice, and to the extent that it needs to be addressed  
23 in the form of a Daubert motion or motion to strike when  
24 expert testimony you think exceeds what's stated or what  
25 was provided or properly disclosed during fact discovery,

1 you know, then I think that's more appropriately addressed  
2 with the motion to strike or a Daubert motion.

3 Because as -- given the number of exhibits and  
4 the type of information this is -- I think exceeds the  
5 discovery dispute and is a pretty in-depth -- requires a  
6 pretty in-depth analysis. So for today, I'm going to deny  
7 the requested relief obviously without prejudice to  
8 re-filing the same language in the form of a motion, be a  
9 Daubert motion to strike or others.

10 And then, with regard to expert disclosure  
11 deadlines, I assume that's something the parties can work  
12 out if you think you need more time, so I'm not going to  
13 address that today.

14 Does that, Mr. -- I'll start with you, Mr. Rich.  
15 Do you have any questions for me about that or any other  
16 issues we need to address this morning?

17 MR. RICH: No, your Honor. I think I understand  
18 that we can revisit this after they serve their opening  
19 report on NIAs.

20 THE COURT: Correct.

21 And, Mr. Schlesinger, or anybody else on behalf  
22 of DJI, Mr. Palmer that any other questions or anything  
23 else we need to address today?

24 MR. SCHLESINGER: No, your Honor. Thank you.

25 THE COURT: All right. Thank you very much. I

1 think we'll on this one, I'll just probably enter a minute  
2 entry, won't do a formal order, just saying that the  
3 requested relief is denied without prejudice so the  
4 parties do not need to submit a written order or anything  
5 like that.

6 All right. And with that, thank you all very  
7 much and we will be adjourned.

8 MR. PALMER: Thank you, your Honor.

9 MR. SIEGMUND: Thank you, Judge.

10 MR. SCHLESINGER: Thank you, your Honor.

11 (Proceedings conclude at 9:47 a.m.)  
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*Lily Iva Reznik*

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